

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROMMELL BORJAS-ALFARO,
Plaintiff,

Nos. C 13-4096 WHA (PR)

ORDER OF SERVICE

vs.

UNITED STATES OF AMERICA,
Defendant.

(Dkt. 1)

INTRODUCTION

Plaintiff, a federal prisoner proceeding pro se, filed a motion seeking emergency medical care in his federal criminal case, No. CR 09-102 RS (N.D.Cal.). Because the motion concerned the conditions of plaintiff's confinement, it was ordered filed as a civil rights complaint in a new civil case. The case was then assigned to the undersigned district judge. Construing the motion as a civil rights complaint, for the reasons discussed below, it has been found to state a cognizable claim for relief and is ordered served upon the defendant. Plaintiff is granted leave to proceed in forma pauperis in a separate order.

ANALYSIS

A. STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.

1 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims
 2 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
 3 monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro
 4 se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
 5 (9th Cir. 1990).

6 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
 7 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the
 8 statement need only "give the defendant fair notice of what the . . . claim is and the grounds
 9 upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted).
 10 Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a
 11 plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than
 12 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
 13 do. . . . Factual allegations must be enough to raise a right to relief above the speculative
 14 level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A
 15 complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.*
 16 at 1974.

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18 **B. LEGAL CLAIMS**

19 Plaintiff alleges that he suffered a leg injury in November 2012 while at the Federal
 20 Detention Center in Dublin, California. The leg injury has led to numbness in his leg and right
 21 arm, "constant pain" and difficulty with walking. His requests for and MRI study were not
 22 granted by prison officials. In June 2013, Dr. David J. Jupina, an orthopedic specialist,
 23 examined plaintiff and recommended an MRI study. Despite his requests for an MRI since that
 24 time, he has not received one. He seeks transportation to a facility outside of his facility for an
 25 MRI. When liberally construed, plaintiff's allegations are sufficient to state a cognizable claim
 26 for the violation of his Eighth Amendment rights. *See Bivens v. Six Unknown Federal*
 27 *Narcotics Agents*, 403 U.S. 388, 392-97 (1971) (private right of action may be implied from the
 28 Constitution itself for allegations of constitutional violations made against federal employees or

their agents); *see also Carlson v. Green*, 446 U.S. 14, 17-19 (1980) (recognizing *Bivens* action for Eighth Amendment claims).

CONCLUSION

For the reasons set out above, it is hereby ordered as follows:

1. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint with all attachments thereto, and a copy of this order upon defendant **United States of America** by serving such items upon the United States Attorney, the Warden of the Federal Detention Center in Dublin, California, and the Director of the United States Bureau of Prisons.

2. Defendant **shall** file an answer in accordance with the Federal Rules of Civil Procedure.

3. In order to expedite the resolution of this case:

a. No later than **91 days** from the date this order is filed, defendant shall file a motion for summary judgment or other dispositive motion. If defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the court prior to the date the summary judgment motion is due. All papers filed with the court shall be promptly served on the plaintiff.

b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the court and served upon defendant no later than **28 days** from the date of service of the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

If defendant files an unenumerated motion to dismiss claiming that plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir.), *cert. denied*, *Alameida v. Wyatt*, 124 S.Ct 50 (2003).

c. Defendant **shall** file a reply brief no later than **14 days** after the date of

1 service of the opposition.

2 d. The motion shall be deemed submitted as of the date the reply brief is due.
3 No hearing will be held on the motion unless the court so orders at a later date.

4 e. Along with his motion, defendant shall proof that they served plaintiff the
5 applicable warning(s) required by *Woods v. Carey*, No. 09-15548, slip op. 7871 (9th Cir. July 6,
6 2012) and/or *Stratton v. Buck*, No. 10-35656, slip op. 11477 (9th Cir. Sept. 19, 2012), at the
7 same time they served him with their motion. Failure to do so will result in the summary
8 dismissal of their motion without prejudice.


9 4. All communications by the plaintiff with the court must be served on defendant, or
10 defendant's counsel once counsel has been designated, by mailing a true copy of the document
11 to defendant or defendant's counsel.

12 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
13 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
14 required before the parties may conduct discovery.

15 7. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
16 informed of any change of address and must comply with the court's orders in a timely fashion.
17 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
18 Federal Rule of Civil Procedure 41(b).

19 IT IS SO ORDERED.

20 Dated: February 4, 2014.

21 
22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion to dismiss for failure to exhaust administrative remedies, they are seeking to have your case dismissed. If the motion is granted it will end your case and there will be no trial.

A motion to dismiss for failure to exhaust administrative remedies is similar to a motion for summary judgment in that the court will consider materials beyond the pleadings. You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions. In considering a motion to dismiss for failure to exhaust administrative remedies, the court can decide disputed factual matters with regard to the exhaustion question. Because the court can resolve factual disputes, unlike a summary judgment opposition, it is not enough to merely show a genuine issue of material fact in opposition to the motion to dismiss.